

BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

In the Matter of)	
)	No O-99-156
Opinion Requested by)	September 10, 1999
Kathryn J Tobias, Chief)	
Counsel of the California)	
Integrated Waste)	
Management Board)	
_____)	

BY THE COMMISSION We have been asked the following question by Chief Counsel Kathryn J Tobias for the California Integrated Waste Management Board (hereafter "CIWMB" or "the Board")

I. Question

May a member of the CIWMB, who has a potential conflict of interest, participate in a decision concerning Rigid Plastic Packaging Containers ("RPPCs") if two of the Board's six appointed seats are vacant, and a quorum consists of four members?

II. Conclusion

Yes The facts as provided to us by the CIWMB demonstrate that, unless the member is permitted to participate, the CIWMB will not have a quorum, and there will be no alternative source of decision Thus, under the "Rule of Legally Required Participation," which is a narrow exception to the Act's conflict of interest rules, the member may participate in the decision

III. Facts**A. The CIWMB and the RPPC Program**

The CIWMB is a six-member board housed within the California Environmental Protection Agency. The members of the board are appointed by the Governor, the Senate Rules Committee, and the Speaker of the Assembly One of the Board's significant programs relates to the recycled content of Rigid Plastic Packaging Containers (the "RPPC Program")¹ The RPPC Program is designed to address a number of important public goals to save landfill space, reduce energy consumption, and preserve natural resources Among other duties, the CIWMB sets the annual statewide recycling rate ("Recycling Rate") for RPPCs, and determines compliance with the RPPC Program

¹ The program is codified at Pub Resources Code § 42300 et seq ("RPPC Act")

Companies that sell RPPCs in California ("RPPC Companies") must satisfy at least one of the criteria set forth in the RPPC Act. If CIWMB determines that the Recycling Rate in a given year is at least 25 percent, all RPPC Companies are deemed to be in compliance. If, however, the Recycling Rate is lower than 25 percent, each RPPC Company must demonstrate that it has complied with one of the other criteria set forth in the RPPC Act. To verify compliance, CIWMB sends out certifications to various RPPC Companies asking them to certify, under penalty of perjury, whether they are in compliance with the RPPC Act. The CIWMB may impose a fine of \$100,000 on any company that fails to comply. CIWMB staff estimates that between 20,000 and 100,000 businesses are subject to the RPPC Program, but cannot provide the exact number.

The Recycling Rate is an essential element of the RPPC Program. Each year, the CIWMB must set the Recycling Rate for the previous year. (Pub Resources Code § 42310) The CIWMB is the only agency authorized to set the Recycling Rate. The CIWMB cannot determine the Recycling Rate for 1997 because one of its members has a potential conflict

B. Former State Senator Roberti's Conflict

Former State Senator David Roberti is a member of the CIWMB. His spouse owns stock in three Fortune 500 companies, Avon, General Electric, and Gillette, each of which may be subject to the RPPC Program. Mrs. Roberti's interest in each of these companies is less than 10 percent. We refer to Senator Roberti's conflict as a "potential conflict of interest" for a number of reasons. CIWMB staff has advised that even with good faith reasonable efforts, a company may not be able to determine whether it is subject to the RPPC Program. It is difficult to determine whether a plastic container is an RPPC. CIWMB has further advised that even if a product's container falls within the definition of an RPPC, the company still must identify whether it sold the product in California during the year in question. After that information is obtained, CIWMB staff must then perform a financial analysis requiring an estimate from the affected companies. The CIWMB staff has not been able to determine with certainty whether the three companies in which Mrs. Roberti is a stockholder are subject to the RPPC Program. However, the CIWMB staff has advised Senator Roberti that he may have a conflict of interest.

C. The RPPC Program is at an Impasse

The CIWMB is a six-member board. At present, two of the six seats are vacant.² Since a quorum requires four Board members, the CIWMB cannot make any decision unless all four Board members participate. Out of caution, Senator Roberti has abstained from participating in

² We reached this decision on August 6, 1999, at the conclusion of the hearing on the opinion request. One of the two vacancies was subsequently filled. We nonetheless believe it appropriate to issue this Opinion memorializing our decision.

any CIWMB decision concerning the RPPC Program. Without his participation, the CIWMB does not have a quorum, and cannot establish the Recycling Rate for 1997. Although the RPPC Act does not mandate the date by which the CIWMB must set the Recycling Rate, it does require that the rate be published annually

IV. Analysis

A. Conflicts of Interest

The Political Reform Act ("Act")³ prohibits a public official from making, participating in making, or in any way attempting to use his or her official position to influence a governmental decision, in which the official knows or has reason to know he or she has a financial interest (Govt Code § 87100)⁴ A public official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on any business entity in which the public official has a direct or indirect investment worth \$1,000 or more (Section 87103(a).) An "indirect investment" includes any investment owned by the official's spouse (Section 87103)

We assume that, for purposes of this Opinion, Senator Roberti has a financial interest sufficient to trigger the conflict of interest rules

B. The Rule of Legally Required Participation

The Act recognizes that there may be instances in which an agency cannot function without the participation of a public official who has a conflict of interest. As the Court of Appeal explained in *Kunec v Brea Redevelopment Agency* (1997) 55 Cal App 4th 511, 520: "The [Act] recognizes the tension between two competing policies of the law the need for unbiased decisionmaking on the one hand . and the need for public action on the other " The Act contains a narrow exception to the conflict of interest rules codified at Section 87101, commonly referred to as the "Rule of Legally Required Participation" (hereafter the "Rule").⁵

³ Government Code sections 81000-91014

⁴ All section citations are to the Government Code, unless otherwise noted

⁵ As recognized by the California Court of Appeal, the Rule is the "statutory analogue" to the common law rule of necessity developed by the courts to prevent government paralysis by officials who have financial interests in the matters before them (*Affordable Housing Alliance v Feinstein* (1986) 179 Cal App 3d 484, 489)

Section 87101 provides, in pertinent part

“Section 87100 does not prevent any public official from making or participating in the making of a governmental decision to the extent his participation is legally required for the action or decision to be made ”

The Commission has interpreted the exception to apply only when there is no other mechanism for reaching a decision See Regulation 18708,⁶ which provides, in pertinent part:

“(a) A public official is not legally required to make or to participate in the making of a governmental decision . unless there exists no alternative source of decision consistent with the purposes and terms of the statute authorizing the decision.

* * *

“(c) This regulation shall be construed narrowly, and shall:

* * *

“(2) Not be construed to allow a [disqualified] member of any public agency .. to vote if a quorum can be convened of other members of the agency who are not disqualified whether or not such members are actually present at the time of the disqualification ”

See also *In re Hudson* (1978) 4 FPPC Ops 13, 16, where we held that a public official’s participation is “legally required” only when the conflict prevents the formation of a quorum, and no alternative source of decision exists.

In determining whether the Rule applied in the context of a vacancy, the Commission looked to a number of factors, which included the nature of the decision, whether there was an alternative method of decisionmaking consistent with the purpose and functions of the particular agency, whether the agency could have changed the quorum requirements, or appointed alternative or interim members who could vote, whether the decision had to be made within a specified time period, and the importance of the agency moving forward

In addition, once it is determined that an otherwise disqualified official may participate pursuant to the Rule, we require the official to follow certain procedural and disclosure requirements First, the official must (1) disclose, as a matter of official public record, the

⁶ All citations to “Regulation ____” are to Title 2 of the California Code of Regulations The Commission recently renumbered its conflict of interest regulations Regulation 18708 was formerly numbered as Regulation 18701 (See the conversion table located in Regulation 18700)

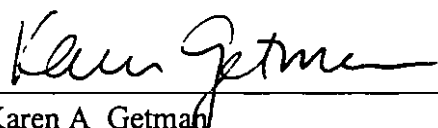
existence of the financial interest, (2) describe with particularity the nature of the financial interest, and (3) state the reason an alternative source of decision does not exist (Regulation 18708(b), see generally *Kunec v Brea Redevelopment Agency* (1997) 55 Cal App 4th 511, 522) Second, while the official may deliberate and vote in open meetings, and in legally authorized closed sessions, the official may not engage in private conversations with other members or staff for the purpose of influencing a decision in which he or she is disqualified. (Regulation 18708(b)(4), see Section 87100, Regulation 18702 3(a).)

C. Application of Law to Facts

In the present case, we find that the establishment of the Recycling Rate is an essential aspect of the RPPC Program There is no alternative source of decision consistent with the purpose and functions of the RPPC Act The CIWMB must set the Recycling Rate annually. The CIWMB staff has advised us that the CIWMB can no longer continue to delay the decision The CIWMB is the only body authorized to make that decision. Appointments to the vacant positions on the CIWMB must be made by the Governor The Governor's Office has not indicated whether or how soon one of the vacancies will be filled.

Based on the facts presented to us, and limited to those facts, we conclude that Senator Roberti may invoke the Rule, and participate in the decision to prescribe the Recycling Rate for 1997 However, the fact that Senator Roberti may participate in the decision does not eliminate the conflict itself. Thus, Senator Roberti must comply with the requirements and limitations set forth in Regulation 18708

Approved by the Commission on September 10, 1999 Concurring. Deaver, Getman, Makel and Scott



Karen A. Getman
Chairman